THE FORCE AND EFFECT OF THE ORDERS OF THE INTERSTATE COMMERCE COMMISSION.

THE Act to regulate commerce of February 4, 1887, sometimes called the "Cullom" law or the "Interstate Commerce" law, was subjected, from the day of its enactment, to a great deal of ignorant and unwarranted criticism. Hasty critics noted at once that the Interstate Commerce Commission, the body created to apply and enforce the new statute, was equipped with no process to compel obedience to its decrees; that to make its conclusions obligatory upon the carriers it must invoke and obtain the aid of the Federal courts, and they too readily assumed that in the absence of such aid, or until it could be utilized in each separate case, the work of the Commission would be unproductive and its orders would be futile. Although the experiment, from the beginning, amply refuted this attack upon the theory of the law and the immense power and influence of the Commission was promptly evident to close observers of its operations,[1] popular opinion never recovered from the initial impression which was made, and, when the revision of the law was undertaken in the years 1905 and 1906, Congress was strongly urged to attempt to

[1] Testifying before the Committee on Interstate Commerce of the United States Senate in May, 1905, Honorable Martin A. Knapp, Chairman of the Interstate Commerce Commission, said, in part:

"There appears to be a disposition in some quarters to discredit the present law and belittle the result of its operations. It has been described as a crude and ill-considered measure which has made little advance toward the accomplishment of its intended purpose. I am very far from having any sympathy with that erroneous view. On the contrary, I regard the Act to regulate commerce as one of the most important and beneficent statutes ever enacted by the Congress of the United States. . . . Only when you compare the conditions which were characteristic and universal in 1887, with the conditions which generally prevail to-day, can you understand what great progress has been made in the conduct of these great highways of commerce. And I say that, if the men who were instrumental in procuring the passage of the Act to regulate commerce have their names connected with no other measure, they deserve to rank high in the list of constructive statesmen. And I say this for the reason, gentlemen, that I do not myself favor any radical departure from the theories and plans and purposes of the present law." Hearings before the Committee on Interstate Commerce, United States Senate, vol. iv, pp. 3292, 3293.

give a different and higher authority to the orders of the Commission. How far the Congressional intent was controlled by this purpose and the scope and validity of the methods employed are the questions proposed for discussion in this paper.[1]

Concerning the system in force from 1887 to 1906, that is until the enactment of the Hepburn law, the Supreme Court said:

"By Section 16 a summary proceeding in equity is authorized and the form of the ultimate order of the court may be that of a 'writ of injunction or other proper process, mandatory or otherwise.' Without attempting now to define the extent of that section we may say it seems adequate to enable the Commission to enforce any order it is authorized to make." [2]

Most of the orders of the Commission were obeyed; in the comparatively rare instances in which the aid of the courts was asked the following inquiries, and these inquiries only, were apparently presented:

A. Has a lawful order been issued?

B. Has it been obeyed?

Of these questions the second was found, in practice, to be negligible, for, while it is obvious that an order might be couched in such general terms as to permit a question as to whether certain acts constituted compliance therewith, no such controversy was, in fact, ever presented to any court. The controverted question, in every one of the forty-five litigated cases, was the lawfulness of the order. As an order might be unlawful because of (*a*) errors of fact or (*b*) errors of law, it was necessary to define the precise weight to be attached to the findings of fact of the Commission in subsequent proceedings for the enforcement of its orders. In an early case,[3] the authority of which has never been successfully challenged, it was held, (*a*) that the law invested the Commission with only administrative powers of supervision and investigation which fell far short of making it a court or its action judicial; (*b*) that its findings of fact, being given only the force and weight of *prima facie* evidence in subsequent judicial pro-

[1] It should be borne in mind that the question of methods of compelling obedience to the Commission's decrees affects a relatively small proportion of the cases it handles. From 1887 to 1906 there were only forty-five instances, out of more than four thousand cases formally or informally considered, in which orders were contested in the courts, and it is a matter of public record that approximately thirty-nine out of every forty cases were settled without litigation in any court.

[2] Interstate Commerce Commission *v.* Lake Shore & Michigan Southern Railroad, 197 U. S. 536, 543.

[3] Kentucky & Indiana Bridge Company *v.* Louisville & Nashville Railroad, 37 Fed. 567.

ceedings, its functions were in the nature of those of a general referee of each and every circuit court of the United States for the matters covered by the Interstate Commerce law; (*c*) that in making these findings *prima facie* evidence Congress merely exercised the well-established legislative power to prescribe a rule of evidence which in no way encroaches upon the courts' proper functions; and (*d*) that the courts were not confined to the mere reexamination of the cases as heard and reported by the Commission, but might hear and determine them *de novo* upon proper pleadings and proofs, the latter including not only the *prima facie* facts reported by the Commission, but all such other and further testimony, bearing upon the matters in controversy, as either party might introduce.[1]

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[1] "While the Commission possesses and exercises certain powers and functions resembling those conferred upon and exercised by regular courts, it is wanting in several essential constituents of a court. Its action or conclusion upon matters of complaint brought before it for investigation, and which the Act designates as the 'recommendation,' 'report,' 'order,' or 'requirement' of the board is neither final nor conclusive; nor is the Commission invested with any authority to enforce its decision or award. Without reviewing in detail the provisions of the law, we are clearly of the opinion that the Commission is invested with only administrative powers of supervision and investigation, which fall far short of making the board a court or its action judicial, in the proper sense of the term. The Commission hears, investigates, and reports upon complaints made before it involving alleged violations of or omissions of duty under the Act; but subsequent judicial proceedings are contemplated and provided for as the remedy for the enforcement, either by itself or the party interested, of its order or report in all cases where the party complained of, or against whom its decision is rendered, does not yield voluntary obedience thereto. . . . The Commission is charged with the duty of investigating and reporting upon complaints, and the facts found or reported by it are only given the force and weight of *prima facie* evidence in all such judicial proceedings as may thereafter be required or had for the enforcement of its recommendation or order. The functions of the commissioners are those of referees or special commissioners, appointed to make preliminary investigation of and report upon matters for subsequent judicial examination and determination. In respect to interstate commerce matters covered by the law, the Commission may be regarded as the general referee of each and every circuit court of the United States, upon which the jurisdiction is conferred of enforcing the rights, duties, and obligations recognized and imposed by the Act. It is neither a Federal court under the Constitution, nor does it exercise judicial powers, nor do its conclusions possess the efficacy of judicial proceedings. . . .

"We are also clearly of opinion that this court is not made by the Act a mere executioner of the Commissioner's order or recommendation, so as to impose upon the court a nonjudicial power. . . . The suit in this court is, under the provisions of the Act, an original and independent proceeding, in which the Commission's report is made *prima facie* evidence of the matters or facts therein stated. It is clear that this court is not confined to a mere reëxamination of the case as heard and reported by the Commission, but hears and determines the cause *de novo*, upon proper pleadings and

What may be called the administrative theory of the new law asserts that for the mechanism for enforcement thus defined, the Hepburn law [1] attempts to substitute a sort of advance legislative acceptance of an indefinite series of blank drafts, containing only the maker's name, to be filled out at discretion by the Interstate Commerce Commission, which is thus empowered to draw at will [2] upon the reservoir of Federal power over railway rates and methods. Let us inquire whether the terms of the enactment support this description. The Commission is authorized to issue orders under several different conditions and for different purposes, but particularly, under Section 15 of the law, it is authorized

". . . whenever, after full hearing upon a complaint . . . it shall be of the opinion that any of the rates, or charges whatsoever demanded, charged, or collected by any common carrier or carriers, subject to the provisions of this Act, . . . or that any regulations or practices whatsoever of such carrier or carriers affecting such rates, are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged; and what regulation or practice in respect to such transportation is just, fair, and reasonable to be thereafter followed; and *to make an order* that the carrier shall cease and desist from such violation, to the extent to which the Commission find the same to exist, and shall not thereafter publish, demand, or collect any rate for charge or such transportation in excess of the maximum rate or charge so prescribed, and shall conform to the regulation or practice so prescribed."

It is further provided, in the same section, that the orders contemplated by the foregoing

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proofs, the latter including not only the *prima facie* facts reported by the Commission, but all such other and further testimony as either party may introduce bearing upon the matters in controversy. The court is empowered 'to direct and prosecute, in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition; and on such hearing the report of said Commission shall be *prima facie* (not conclusive) evidence of the matters therein stated.' No valid constitutional objection can be urged against making the findings of the Commission *prima facie* evidence in subsequent judicial proceedings. Such a provision merely prescribes a rule of evidence clearly within well-recognized powers of the legislature, and in no way encroaches upon the court's proper functions." Kentucky & Indiana Bridge Company *v.* Louisville & Nashville R. R., 37 Fed. 567.

[1] Approved June 29, 1906, 34 Stat. L. 584.

[2] The Commission may, itself, institute proceedings "to the same effect as though complaint had been made," but, perhaps, this clause does not authorize rate-making without actual and formal complaint. Section 13.

"shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the Commission, unless the same shall be suspended or modified or set aside by the Commission or set aside by a court of competent jurisdiction."

Supplementing these provisions the next section of the Act proceeds to provide penalties for disobedience and means for the enforcement of those penalties, in part, as follows:

"Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of section fifteen of this Act, shall forfeit to the United States the sum of five thousand dollars for each offense. Every distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense.

"The forfeiture provided for in this Act shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States, . . ."

Here, apparently, is an attempt to give the force of law to the act of an appointive Commission and to penalize transgression of the *quasi*-laws, regulations or administrative orders, by whatever term they are most accurately designated, which that Commission may proclaim. Legislation along this line, to be valid, must be within strictly defined limits.[1] If the language of Sections 15 and 16 cannot be construed in any way except as indicating an intention to confer legislative powers upon the Commission this entire portion of the Act is invalid as beyond the constitutional power of Congress; if, on a narrower view, the power is not otherwise actually legislative in character but there has been an attempt to empower the Commission to set up rules which,

[1] "One of the settled maxims in constitutional law is, that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the State has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the Constitution itself is changed. The power to whose judgment, wisdom and patriotism this high prerogative has been entrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom and patriotism of any other body for those alone to which the people have seen fit to confide this sovereign trust." Cooley, Constitutional Limitations, 7th ed., p. 163.

"The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made." Field *v.* Clark, 143 U. S. 649.

if effectively supplemented by the penal clause, would subject to penalties as unlawful conduct which, in the absence of such rules, would be lawful, then the authority to issue the order may be sustained, but the penalties will fail and other portions of the statute must be searched for a means of enforcing the regulative orders.

It is to be noted that the order provided for in Section 15 is to issue when the Commission, being duly informed, shall be of a certain "opinion"; that this order may be "suspended or modified or set aside" by the Commission, or "suspended or set aside" by a court of competent jurisdiction, and that the period of its effectiveness is, within limits fixed by the statute, left to the discretion of the Commission. It is also important to note the fact that the penalty of forfeiture for violation of one of these orders and the manner of the enforcement of the penalty differ from the penalties and procedure provided in Section 10 for other violations of the Act. Section 16 prescribes a forfeiture to the United States to be collected by a civil suit, while Section 10 prescribes the ordinary criminal penalties of fine and imprisonment to be enforced by the ordinary criminal processes.[1]

Considering the language of the statute without regard to the rule of construction which requires the adoption of that interpretation which brings the enactment within the constitutional authority of the legislature, there would seem to be a good deal of reason for holding that the orders contemplated necessarily involve the exercise of legislative discretion. In Interstate Commerce Commission *v.* Cincinnati, New Orleans & Texas Pacific Railroad, the Supreme Court said:

"It is one thing to inquire whether the rates which have been charged and collected are reasonable, — that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future, — that is a legislative act."[2]

The foregoing extract supports the suggestion that there can be but two means of dealing with interstate railway rates, — the legislative means and the judicial means. The Commission cannot have legislative power; it has not judicial power, for it could not exercise it

[1] Section 5440 of the Revised Statutes imposes penalties of fine and imprisonment whenever "two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy." So far as the prohibitions of the Hepburn law are effective, this section is undoubtedly applicable. See United States *v.* Howell, 56 Fed. 21.

[2] 167 U. S. 479, 499, 500.

without its members having the judicial tenure of their positions. But it might, within proper limits, be an adjunct to the body possessing legislative power; it may appear that it is an adjunct to the judicial branch of the Federal government. So far as the quotation seems to suggest that the judicial power is incompetent to deal with future rates it is plainly qualified by later sentences in the same opinion which clearly recognize a certain degree of judicial power to control future charges for the services of railway common carriers.

"And the argument is now made, and made with force, that while the Commission may not have the legislative power of establishing rates, it has the judicial power of determining that a rate already established is unreasonable, and with it the power of determining what should be a reasonable rate, and [to] enforce its judgment in this respect by proceedings in mandamus." [1]

Evidently the court thought that such power might have been conferred upon the Commission, in its capacity as "general referee" for the several circuit courts, and that such orders might have been made effective by subsequent judicial decrees, but that as it was not conferred "in unmistakable terms" it could not be derived by implication. The opinion, in the next sentence, continues:

"The vice of this argument is that it is building up indirectly and by implication a power which is not in terms granted." [2]

Members of the Interstate Commerce Commission have not hesitated, either before or since the passage of the Hepburn law, to describe the powers they claim under its fifteenth section, in terms

[1] 167 U. S. 479, 509.

[2] 167 U. S. 479, 509. It will be observed that this view of the meaning of the opinion serves, also, to explain the sentence in the opinion, so inexplicable when considered as approving a delegation of legislative power, which has troubled so many students. This sentence, in no way essential to the determination of the case then in hand, follows: "Congress might itself prescribe the rates; or it might commit to some subordinate tribunal this duty; or it might leave with the companies the right to fix rates, subject to regulations and restrictions, as well as to that rule which is as old as the existence of common carriers, to wit, that rates must be reasonable." 167 U. S. 479, 494. Whatever doubt the foregoing may have raised in any mind as to the real attitude of the Supreme Court must have been dispelled by the unanimous opinion, written by the same hand, in Interstate Commerce Commission *v.* Chicago Great Western Railway, which says: "It is unnecessary . . . even to determine whether the language is sufficiently definite to make the duties cast on the Interstate Commerce Commission ministerial, and therefore such as may legally be imposed upon a ministerial body, or legislative, and therefore, under the Federal Constitution, a matter for Congressional action, . . ." 209 U. S. 108, 117, 118.

that unmistakably involve the exercise of legislative discretion. Thus, the accomplished Chairman of the Commission, whose clear intelligence, integrity of purpose, long service and courage in expression give exceptional weight to his published views, told the Committee on Interstate Commerce of the Senate, while the Hepburn law was under consideration:

"To my notion regulation is legislation. It must in the nature of the case begin with the tariff — that is to say, it must begin with requiring the announcement by the carrier of what he is going to charge. And then two questions at once arise . . . and the other question is, If that rate is wrong, how is it going to be corrected? . . .

"A tariff is a law. It is a rule of action of general application. So long as it is in force it has all the characteristics and all the binding obligations of a statute. To depart from it is a misdemeanor, and it does not make any difference whether that tariff law is passed by the railroads, made by a Commission, or enacted by Congress. In either case, if that law is wrong the only thing to do is to change the law. If that law is broken, then the thing to do is to punish the man who broke it. The courts are constituted to apply and enforce law and to punish those who violate law. The legislature is ordained to make laws and change laws, and in the very nature of the case the proposal to use the methods of a court to deal with a purely legislative question is incongruous and unsuitable." [1]

Again, after the enactment of the present law, speaking before the National Grain Dealers' Association, Chairman Knapp said:

"But when it comes to the other question, Is the toll which everybody pays more than ought to be paid; does it yield an excessive revenue to the carrier who is allowed to discharge this governmental function; does it operate with discriminating effect between different localities, or different articles of traffic; then I say you come to a question which the courts cannot and will not satisfactorily determine. And for this fundamental reason, that the question you thus raise is not a judicial question, but a legislative question.

. . . . . .

"Therefore, the tribunal and instrumentality by which these questions are to be determined must be not a judicial tribunal, but a legislative tribunal." [2]

Another commissioner, Honorable Charles A. Prouty, writing in the light of many years' experience as a member of the Federal regulative body, in the year 1906, said:

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[1] Hearings before the Committee on Interstate Commerce, United States Senate, vol. iv, pp. 3299, 3300.

[2] Freight, December, 1907.

"Now the fixing of a railway rate is in its nature legislative rather than judicial. There is no standard by which it can be determined. . . . It is finally a question of judgment what, taking everything into account, ought fairly to be done." [1]

. . . . . .

"The making of a railway rate rests in the judgment of the traffic official. Within very wide limits that official could not demonstrate by any legal standard and legal evidence that his rate was right; neither could the shipper demonstrate by the same methods that it was wrong." [2]

Notwithstanding these expressions and the impression likely to be derived from a hasty and superficial examination of the law, it is by no means certain that Congress, in formulating Section 15, fell into the error of attempting to delegate a portion of its legislative authority. Certainly, it is to be presumed in construing any separable part of the law, regardless of what may appear in some other separable part, that Congress was fully informed as to the unconstitutionality of any such delegation, and, if the language of the portion being construed will permit any conclusion as to the Congressional intent which is not obnoxious to the constitutional requirement, that conclusion is the one which is legally correct.

"It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity." [3]

It was even held by the Supreme Court in the "Commodities Clause" case and in Harriman *v.* Interstate Commerce Commission, that a statute must be so construed as to adopt that one among different meanings which avoids grave constitutional doubts or difficulties.

"If we felt more hesitation than we do, we still should feel bound to construe the statute not merely so as to sustain its constitutionality, but

[1] American Monthly Review of Reviews, May, 1906.

[2] American Monthly Review of Reviews, July, 1906. Of course no carrier can be, or ought to be called upon, in the absence of proof to the contrary, to prove "that his rate was right." As the Supreme Court said, in Interstate Commerce Commission *v.* Chicago Great Western, "The presumption of honest intent and right conduct attends the action of carriers as well as it does the action of other corporations or individuals in their transactions in life. . . . Those presumptions of good faith and integrity which have been recognized for ages as attending human action have not been overthrown by any legislation in respect to common carriers." 209 U. S. 108, 119, 120.

[3] United States *v.* Delaware & Hudson Company (the "Commodities Clause" case), 29 Sup. Ct. 527, and cases there cited.

so as to avoid a succession of constitutional doubts, so far as candor permits." [1]

. . . . . .

". . . the rule plainly must mean that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." [2]

But if search is made for an interpretation which avoids the constitutional inhibition of a delegation of legislative power and establishes in the Commission an authority not legislative in character, we are met, almost at the beginning, by a serious, though perhaps not insurmountable, obstacle. This is not, that the Commission is accorded power to name, in its order, the precise maximum rate, or even to define the precise "regulation or practice" that is just and reasonable "to be thereafter observed in such case." As has already been made clear, the Supreme Court in the "Maximum Rate" case [3] did not declare that a grant of power to make such an order would have been ineffective; it merely held that no such grant had been made. If the courts of the United States can be authorized to control future rates, the Commission, as an auxiliary of the Federal courts, can be empowered to fix, subject to proper judicial review, the rates to be charged. Such judicial power to control future rates and practices was exercised several times in the enforcement of orders of the Interstate Commerce Commission under the Cullom law,[4] and unless it exists the decision of the Supreme Court in United States *v.* Missouri Pacific [5] is without explanation or meaning. The true doctrine is doubtless that enunciated in Janvrin *v.* Revere Water Company [6] by the Supreme Court of Massachusetts, which is briefly epitomized in the following extract:

"It calls on us to fix the extent of actually existing rights. With regard to such rights judicial determinations are not confined to the past. If it

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[1] Harriman *v.* Interstate Commerce Commission, 211 U. S. 407.

[2] United States *v.* Delaware & Hudson Company, 29 Sup. Ct. 527.

[3] Interstate Commerce Commission *v.* Cincinnati, New Orleans & Texas Pacific Railroad, 167 U. S. 479.

[4] A decision commanding obedience to an order of the Commission naming a specific rate to be observed in the future was apparently approved by the United States Supreme Court in the "Social Circle" case. Cincinnati, etc. Ry. Co. *v.* Interstate Commerce Commission, 162 U. S. 184.

[5] 189 U. S. 274.

[6] 174 Mass. 514; 47 L. R. A. 319.

legitimately might be left to this court to decide whether a bill for water furnished was reasonable, and if not to cut it down to a reasonable sum, it equally may be left to the court to enjoin a company from charging more than a reasonable sum in the immediate future."

But, if there is no insurmountable obstacle in the fact that the Commission's orders are to be more specific than formerly, there is a very real and a very serious obstacle in the clause which seeks to give them the immediate force of law by prescribing penalties for their infraction. No body that is not legislative in character can define an Act or an omission which is, therefore and thereafter, to be regarded as criminal and to subject the person who commits or omits it to penalties. Than this, there is no function of government more essentially legislative. The penalty clause of Section 16, already quoted herein,[1] does not apply to the carrier, or carrier's agent, who is guilty of exacting an unreasonable or unjust rate or of enforcing an unreasonable or unjust regulation or practice, but to the person who disobeys an order of the Commission. Even applying to this clause the inevitably necessary qualification that to be effective at all the order to which it could relate must be a lawful order, that is to say, regularly issued and actually commanding observance of a reasonable maximum rate or a just regulation or practice, it is plain that the thing sought to be punished is not violation of the law against unreasonable rates or methods, but violation of the order of the Commission. Infractions of Federal law may be penalized by forfeitures of money, such forfeitures to be collected by a civil suit in the name of the United States, but

"This, though an action civil in form, is unquestionably criminal in its nature, . . ." [2]

In United States *v.* Eaton,[3] the Supreme Court had under consideration a demurrer to an indictment against a person accused of violating a regulation of the Commissioner of Internal Revenue requiring wholesale dealers in oleomargarine to keep certain books and to make certain reports, the regulation having been promulgated in accordance with the statute. The Court held that such a dealer who "knowingly and wilfully" failed to keep the books or to make the reports was not liable to the penalties of the law, saying, in part:

[1] *Ante*, p. 16.

[2] Lees *v.* United States, 150 U. S. 476, 480. See also Boyd *v.* United States, 116 U. S. 616, 634, and Hepner *v.* United States, 29 Sup. Ct. 474.

[3] 144 U. S. 677.

"Much more does this principle apply to a case where it is sought substantially to prescribe a criminal offense by the regulation of a department. It is a principle of criminal law that an offense which may be the subject of criminal procedure is an act committed or omitted 'in violation of a public law, either forbidding or commanding it.'"

Recent cases arising under the laws concerning public forests and forest reservations are apparently upon all fours with those that may arise in efforts to enforce forfeitures for violations of the Commission's orders. By an Act of Congress, approved on June 4, 1897, the Secretary of the Interior was authorized to make rules and regulations for the protection of the public forests against destruction by fire and depredations, and it was specifically provided that violations of these regulations should be punished the same as violations of the Act itself.[1] Subsequently the authority of the Secretary of the Interior was transferred by law to the Secretary of Agriculture, and the latter promulgated certain regulations. Sustaining a demurrer to an indictment charging violation of one of these regulations, Judge Whitson, in the Federal District Court for the Eastern District of Washington, said:

"It is fundamental that the citizen has the right to rely upon the statutes of the United States for the ascertainment of the acts which constitute an infraction of its laws.

. . . . . .

"A citizen desiring to obey the laws would search the acts of Congress in vain to find that grazing sheep upon a forest reserve without the permit of the Secretary of Agriculture is a criminal offense. It has been suggested that the acts under which the indictment is drawn give notice that the Secretary may make rules and regulations, and that the search would not be complete and the inquiry concluded until it be ascertained whether he has made such rules and regulations, the violation of which it is expressly declared shall be a criminal offense. But here we are led back to the delegation of legislative power. The rules prescribed by the heads of the departments are not necessarily promulgated. While they may be procured, they are not as easily available as are the statutes of the United States; nor does our system contemplate an examination of those rules for the ascertainment of that which may or may not be a crime, for the right to prohibit a given thing under penalty belongs to Congress alone.

. . . . . .

"Congress cannot leave a statute to be enlarged upon either by the courts or the executive department. It cannot authorize any other branch of the government to define that which is purely legislative, and that is purely leg-

[1] 30 Stat. L. 35.

islative which defines rights, permits things to be done or prohibits the doing thereof. Certainly here, it is the Secretary of Agriculture who has undertaken to enact this law. He it is who has designated that which constitutes the crime. The thing prohibited, the thing for which the party is to be punished, the act which is the offense, is prescribed by the Secretary, and not enacted by Congress. As we have seen, this cannot be done." [1]

In a similar case arising in another jurisdiction, Judge Wellborn, of the United States District Court for the Southern District of California, said:

"Thus it will be seen that the very essence of the alleged crime, namely, what act shall constitute it, is not fixed by Congress, but wholly confided to the discretion of an administrative officer. If this does not necessarily involve a delegation of legislative power, it is difficult to conceive of a statute challengeable on that ground." [2]

It is plain that, if the foregoing extracts correctly express the law of the land, so much of the Hepburn law as seeks to impose penalties for disobedience of the orders of the Commission, before they have received judicial sanction and obedience to them has been commanded by courts of competent jurisdiction, must be unconstitutional and inoperative. The propriety of the suggested construction is fully sustained by the opinion of the Supreme Court of the United States in Reagan *v.* Farmers Loan & Trust Company, from which the following is taken:

"We do not deem it necessary to pass upon these specific objections because the fourteenth section or any other section prescribing penalties may be dropped from the statute without affecting the validity of the remaining portions, and if the rates established by the Commission are not conclusive, they are at least *prima facie* evidence of what is reasonable and just. For the purpose of this case it may be conceded that both the clauses are unconstitutional, and still the great body of the act remains — that which establishes the Commission, and empowers it to make reasonable rates and regulations for the control of railroads. It is a familiar law that one section or part of an act may be invalid without affecting the validity of the remaining portion of the statute. Any independent portion may be thus dropped out if that which is left is fully operative as a law, unless it is evident from a consideration of all the sections that the legislature would not have enacted that which is within, independently of that beyond its power, applying this rule, and the invalidity of these two provisions may be conceded without impairing the force of the rest of the act.

[1] United States *v.* Matthews, 146 Fed. 306, 308, 310.

[2] United States *v.* Grimand, 170 Fed. 205, 209.

The creation of a commission, with power to establish rules for the operation of railroads and to regulate rates, was the prime object of the legislature. This is fully accomplished whether any penalties are imposed for a violation of the rules prescribed, or whether the rates shall be conclusive or simply *prima facie* evidence of what is just and reasonable. The matters of penalty and the effect as evidence of the rates are wholly independent of the rest of the statute. Neither can it be supposed that the legislature would not have established the Commission and given it power over railroads without these independent matters."[1]

It is equally clear that, to save Section 15 from complete failure as an unconstitutional effort to delegate legislative power, the scope of the Commission's authority to issue orders must be interpreted so as not to involve the exercise of legislative discretion. Then, there will remain as an effective means of compelling obedience to proper orders when such obedience is not voluntarily accorded, the clause of Section 16 empowering the Commission, or any party injured by failure to obey such an order, to apply to a Federal circuit court for its enforcement and authorizing the courts to hear and determine such cases and to grant the necessary relief. That is to say, the construction necessary to give constitutionality to Sections 15 and 16 substantially restores the old procedure for the enforcement of the Commission's orders. These orders cannot be "self-enforcing" without being legislative in character; those who ignore them until they are sanctioned by a court cannot be subjected to penalties save those of public sentiment. The Commission is, as it always has been, the "general referee" in interstate commerce matters covered by the law for the circuit courts of the United States.

The new law differs somewhat from the old in the language in which it defines the relation of the courts and the Commission when the latter (or an interested party) has applied for a decree enforcing an order. To reveal the precise difference in terms these portions of both laws are set forth below in parallel columns.

The "Cullom" law.	*The "Hepburn" law.*
"That whenever any common carrier, as defined in and subject to the provisions of this Act, shall violate, or refuse or neglect to obey or perform *any lawful order or requirement* of the Commission . . . it shall	"If any carrier fails or neglects to obey *any order* of the Commission . . . any party injured thereby, or the Commission in its own name, may apply to the circuit court . . . for an enforcement of such order. Such

[1] 154 U. S. 362, 395, 396.

be lawful for the Commission or for any company or person interested in such order or requirement, to apply in a summary way by petition, to the circuit court . . . alleging such violation or disobedience, as the case may be; and the said court shall have power to hear and determine the matter, on such short notice to the common carrier complained of as the court shall deem reasonable; and such notice may be served on such common carrier, his or its officers, agents, or servants in such manner as the court shall direct; and said court shall proceed to hear and determine the matter speedily as a court of equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises; and to this end such court shall have power, if it think fit, to direct and prosecute in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition; *and on such hearing the findings of fact in the report of said Commission shall be prima facie evidence of the matters therein stated;* and if it be made to appear to such court, on such hearing or on report of any such person or persons, that the *lawful order*, or requirement of said Commission drawn in question has been violated or disobeyed, *it shall be lawful for such court* to issue a writ of injunction or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation or disobedience of such order or requirement of said Commission, and enjoining obedience to the same; and in case of any disobedience of any such writ of injunction or other proper process, mandatory or otherwise, it shall be lawful for such court to application shall be by petition, which shall state the substance of the order and the respect in which the carrier has failed of obedience and shall be served upon the carrier in such manner as the court may direct, and the court shall prosecute such inquiries and make such investigations, through such means as it shall deem needful in the ascertainment of the facts at issue or which may arise upon the hearing of such petition. If, upon such hearing as the court may determine to be necessary, it appears that *the order was regularly made and duly served* and that the carrier is in disobedience of the same, *the court shall enforce obedience* to such order by a writ of injunction, or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it, or them, obedience to the same; and in the enforcement of such process the court shall have those powers ordinarily exercised by it in compelling obedience to its writs of injunction and mandamus."

issue writs of attachment, or any other process of said court incident or applicable to writs of injunction or other proper process, mandatory or otherwise, against such common carrier, and if a corporation, against one or more directors, officers, or agents of the same, or against any owner, lessee, trustee, receiver, or other person failing to obey such writ of injunction, or other proper process, mandatory or otherwise; and said court may, if it shall think fit, make an order directing such common carrier or other person so disobeying such writ of injunction or other proper process, mandatory or otherwise, to pay such sum of money, not exceeding for each carrier or person in default the sum of five hundred dollars for every day after a day to be named in the order that such carrier or other person shall fail to obey such injunction or other process, mandatory or otherwise; and such money shall be payable as the court shall direct, either to the party complaining or into court, to abide the ultimate decision of the court, or into the Treasury; and payment thereof may, without prejudice to any other mode of recovering the same, be enforced by attachment or order in the nature of a writ of execution, in like manner as if the same had been recovered by a final decree *in personam* in such court."

The changes of phraseology which are particularly significant in connection with the discussion which follows are indicated, in the foregoing extracts, by italics. No one will fail to note the omissions of the word "lawful" as a qualification of the word "order," nor the substitution therefor, in the clause defining the condition precedent to the issue of the enforcing writ, of the requirement that the order shall have been "regularly made and duly served." The other significant alteration in this portion of the statute is the omission of the rule which formerly made the findings of fact of the Commission *prima facie* evidence. It is very difficult to comprehend how any one could

have regarded the word "lawful" in the original law as actually limiting in any degree the judicial power to enforce the orders of the Commission or attach any importance whatever to the substitution of the qualification "regularly made and duly served" in the new law. Certainly no statutory language could authorize the enforcement of an unlawful order, and none could be "regularly made" unless it were "lawful."

It would seem then that the conclusions reached in Kentucky & Indiana Bridge Company *v.* Louisville & Nashville Railroad,[1] already herein quoted, are applicable to proceedings for the enforcement of orders, under the new law, except that there are no longer any authoritative findings of fact which are entitled to be considered *prima facie* evidence, and that this decision as accurately defines the function of the Commission under the Hepburn law as it did under the law actually in force when it was rendered. The Commission has no authority, — it could have no authority, — to prescribe a rate or regulation or practice which is not limited in the law by the requirement that it must be reasonable and just. This limitation upon its authority is in the express terms of the statute and it is essential to the existence of any authority at all. And whether an act done under color of a power granted is actually within the terms of the grant of power must always be a fundamental inquiry when the validity or efficacy of the act is in question.[2] It is almost too obvious to be stated without apology, that in any judicial inquiry as to whether the Commission has acted within the scope of its authority every fact and consideration must be material and relevant which would have been material and relevant in the investigation upon which the Commission based the challenged order.

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[1] *Ante*, p. 13.

[2] "On the other hand, under another possible construction of the provision, the court has power to pass upon the reasonableness of the orders of the Commission upon their merits. We notice a trend in the decisions toward the latter construction, but we deem it inexpedient to express any opinion in the matter until after a final hearing." New York Central & Hudson River R. R. *v.* Interstate Commerce Commission, 168 Fed. 131.

"I have believed that if a law conferred upon a commission the authority in such a case as this — one of these contested cases — to substitute a reasonable rate, that the carrier could go to court on the theory that the Commission had exceeded its authority by prescribing an unreasonable rate." Honorable Martin A. Knapp, Chairman, Interstate Commerce Commission, Testimony before Interstate Commerce Committee, United States Senate, May, 1905, vol. iv, p. 3303.

The results of this inquiry may now be briefly summarized. If the analysis which has been undertaken is correct, it follows (*first*) that, as Congress could not confer legislative power upon the Commission, and as merely ministerial methods are incompetent to perform the tasks of rate-regulation, the orders which the regulative agency is empowered to make must depend upon inquiries of judicial quality; (*second*) that these orders cannot have compulsory force of themselves but must depend for their enforcement upon the Federal courts; and (*third*) that the forfeitures attempted to be provided for failure to obey orders must fail, as only a legislative body can define an act or an omission which by such definition becomes penal. It may be, also, that the rates named in an order made by the Commission, are entitled to weight, as *prima facie* evidence of what is just and reasonable, in a suit brought, under Section 8, by a plaintiff claiming damages for the omission of an act, viz. the act of obedience to an order, required by the law. When asked to enforce an order of the Commission the Federal circuit court must proceed substantially as it did under the "Cullom" law, except that it no longer has the aid of a *prima facie* case made up by the Commission.

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